

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

MARY POWE)	
Claimant)	
VS.)	
)	
ARMOUR SWIFT-ECKRICH, INC.)	Docket No. 259,985
Respondent)	
Self-Insured)	
AND)	
)	
VENATOR GROUP)	Docket No. 258,968
Respondent)	
AND)	
)	
LUMBERMEN'S MUTUAL CASUALTY COMPANY)	
Insurance Carrier)	

ORDER

Respondent Armour Swift-Eckrich, a self-insured, appeals the March 4, 2002 Order of Administrative Law Judge Bryce D. Benedict. Respondent was ordered to provide temporary total disability compensation and medical treatment for injuries suffered while claimant was employed with respondent, with the date of accident being January 28, 2001.

ISSUES

- (1) Did claimant suffer accidental injury on the date or dates alleged?
- (2) Did claimant's accidental injury or injuries arise out of and in the course of her employment with respondent Armour Swift-Eckrich?
- (3) Did claimant provide timely notice of accidental injury?
- (4) Did the Administrative Law Judge exceed his jurisdiction by entering an Order after claimant had requested a dismissal pursuant to K.A.R. 51-3-1(e)?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Based upon the evidence presented and for the purposes of preliminary hearing, the Appeals Board (Board) finds the Order of the Administrative Law Judge should be affirmed.

Claimant was originally injured on September 16, 1998, while working for Venator Group, when the forklift she was driving was struck by another forklift. Claimant received conservative treatment and by September 30, 1998, was "ready to go back to work". The September 28, 1998 letter from Heather Thiessen, CPTA, from the Geary Rehabilitation and Fitness Center to M. Mosier, M.D., indicated that claimant was feeling better and on a scale from one to ten, had a zero level of pain. Ms. Thiessen also noted that claimant indicated she was ready to return to full duty.

In Dr. Mosier's office notes of September 30, 1998, it stated that with regard to claimant's neck and left shoulder, she was "ready to go back to work". Claimant was noted to be one hundred percent improved as to her neck, and her back was "fine". There was an indication that her left shoulder continued to catch, but this condition appeared temporary.

Claimant returned to work with Venator. Claimant sought additional treatment for her shoulder and neck in April of 1999. She was seen at that time by Bryan Calkins, P.A. She was returned to work with no restrictions. Claimant's employment with Venator was terminated in October of 1999.

In February of 2000, claimant began working for Armour Swift-Eckrich, working 10½-hour shifts. After several months at Armour Swift-Eckrich, claimant began experiencing a return of her symptoms. She was returned to Bryan Calkins, P.A., in June of 2000. Mr. Calkins advised that, in his opinion, claimant's symptoms were attributable to her recent employment at Armour Swift-Eckrich. Venator then declined to provide additional treatment.

Claimant next sought treatment in September of 2000, when she went to the emergency room of the Geary Community Hospital.

Claimant worked through January 28, 2001, when she was taken off of work. She remained off work until September 2001, at which time she returned to work, performing light duty. A February 2001 MRI revealed a herniated disc at C6-7. A cervical fusion was recommended. Jimmy W. Jenkins, M.D., a family practitioner from Junction City, noted in his January 19, 2001 report that claimant's condition had worsened with "a different occupation".

Claimant testified that when she went to work at her new job with Armour Swift-Eckrich, her condition worsened. She advised her supervisor, Kathy Bahn, that there was too much pulling and twisting involved.

After returning to light duty in September of 2001, claimant continued until December, when she was placed on a production line. Claimant worked the production line through January 22, 2002, and was then taken off the line and has not worked since.

The Administrative Law Judge found it more likely than not that claimant's employment at Armour Swift-Eckrich permanently aggravated claimant's preexisting medical condition.

It is well established under the workers' compensation law in Kansas that, when a worker's job duties aggravate or accelerate an existing condition or disease or intensify a preexisting condition, the aggravation becomes compensable as a work-related accident. Demars v. Rickel Manufacturing Corporation, 223 Kan. 374, 573 P.2d 1036 (1978).

The risk of employing a worker with a preexisting condition and, thereby, making the worker susceptible to injury, falls on the employer. Chinn v. Gay & Taylor, Inc., 219 Kan. 196, 547 P.2d 751 (1976).

Here, as claimant's condition has been found to have been aggravated by her employment with Armour Swift-Eckrich, the Order of the Administrative Law Judge, assessing claimant's current temporary total disability compensation and ongoing medical treatment to respondent Armour Swift-Eckrich, is affirmed.

Respondent Armour Swift-Eckrich also alleged the Administrative Law Judge exceeded his jurisdiction by entering an order after claimant requested a dismissal pursuant to K.A.R. 51-3-1(e). That same issue was raised to the Board on an appeal from the May 1, 2001 Order of Administrative Law Judge Bryce D. Benedict. The Board ruled, at that time, that the issue was interlocutory in nature and did not grant the Board authority to review the preliminary hearing order. The Board found that that particular issue, appealed from a preliminary hearing, pursuant to K.S.A. 44-534a, was not an issue over which the Board had jurisdiction to consider. The Board held and continues to hold that the issue is interlocutory in nature and not a final decision, and the appeal of that issue must, therefore, be dismissed.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Order of Administrative Law Judge Bryce D. Benedict dated March 4, 2002, should be, and is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of June 2002.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: John J. Bryan, Attorney for Claimant
Mark E. Kolich, Attorney for Respondent
Bryce D. Benedict, Administrative Law Judge
Philip S. Harness, Director